

***United States Court of Appeals
for the Second Circuit***



APPELLEE'S BRIEF

77-1328

To be argued by
DAVID W. DENTON

United States Court of Appeals
FOR THE SECOND CIRCUIT

Docket No. 77-1328

UNITED STATES OF AMERICA,

Appellee,

—v.—

MICHAEL D. KNABLE,

Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR THE UNITED STATES OF AMERICA

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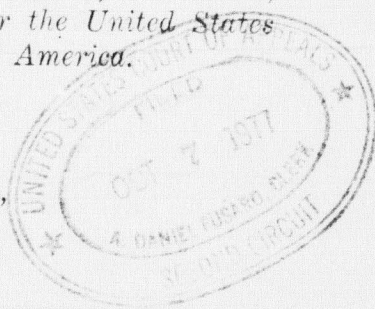


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BRIEF FOR THE UNITED STATES OF AMERICA

Preliminary Statement

Michael D. Knable appeals from a judgment of conviction dated July 18, 1977, after a guilty plea in the United States District Court for the Southern District of New York, before the Honorable Milton Pollack, United States District Judge.

Indictment 77 Cr. 213 (MP), filed on March 28, 1977, charged Knable with three counts (Counts 1-3) of making false statements in connection with income tax matters, in violation of 26 U.S.C. § 7206(2), and thirteen counts (Counts 4-16) of making false statements and representations to the Internal Revenue Service, in violation of 18 U.S.C. § 1001.

On May 12, 1977, Knable pleaded guilty to Counts 1, 2, 3 and 6 of the indictment. On July 18, 1977, he was sentenced to two years in the custody of the Attorney General on each count, to run concurrently.

Statement of Facts

This indictment was filed on March 28, 1977. The charges arose out of Knable's repeated false statements, in powers of attorney filed in connection with his representation of clients before the Internal Revenue Service, to the effect that he was an attorney and/or certified public accountant, licensed in several states, when in fact he was neither.

On April 25, 1977, Knable filed notice of his intent to rely on the insanity defense and to introduce expert testimony relating to the issue of whether he had the mental state required for the offense charged. Subsequently, on the Government's motion pursuant to 18 U.S.C. § 4244, Knable was examined by Gurston D. Goldin, M.D., who reported to the court that Knable was competent to stand trial and that "[a]t the time of his behavior constituting the offense with which he has been charged, there was no impairment of his ability, as the result of mental disease or defect, to appreciate the wrongfulness of his behavior or to conform his behavior to the requirements of law." (App. 8-9).^{*} Dr. Goldin also reported that Knable's false representations that he was an attorney and/or CPA "represented a pathological (maladaptive) psychological defense against unacceptable feelings of inadequacy and deficiency and an acting-out of unresolved internal problems relating to his self-image and self-worth." (App. 8).

When Judge Pollack sentenced Knable on July 18, 1977, Knable's attorney, Robert Koppelman, addressed the court at length in mitigation of sentence. Defense counsel attempted to convince Judge Pollack that Knable

^{*} "App." refers to Appellant's Appendix; "Br." refers to Appellant's Brief.

had no fraudulent intent in misrepresenting himself as an accountant and an attorney. He argued that the defendant charged his clients reasonable fees and thus had no financial motive in making the misrepresentations. He attempted to portray Knable as a victim of his psychological problems. (App. 12, 13-16). Knable made a statement in his own behalf before sentence was imposed. (App. 16-20). He stated that he agreed with the psychological reports and attempted to convince Judge Pollack that "[t]here was no intent on my part to hurt or gain from my actions. . . ." (App. 17).

After the defense presentations, Judge Pollack requested information about certain matters before the court. Specifically, he tried to ascertain the source of indebtedness that caused Knable to file for bankruptcy. When Knable responded that he had made purchases and found himself unable to pay, the court asked, whether "\$180,000 of indebtedness on 'suits and judgments' was caused by charges against you for fraud by your clients?" (App. 18). Knable explained that those suits and judgments resulted from non-payment of his American Express and Master Charge accounts, the foreclosure of his house "and other items." He specifically informed Judge Pollack, "I have no suits by clients, your Honor." (App. 19). Judge Pollack then asked whether Knable considered it fraudulent to make purchases without intention to pay for them. Knable explained that he made various purchases when his income enabled him to make the payments, but that a recent fall-off of his business, which he claimed was the result of IRS investigation of his activities, had caused him to default on numerous obligations. (App. 17-19).

The District Court then asked if the Government had any statement to make. The Government stated that it had nothing to add to the information contained in its Sentencing Memorandum. The Sentencing Memorandum contained no information about Knable's indebtedness or

his fraudulent intent. Rather, the Memorandum merely brought to the court's attention an incident occurring on June 16, 1977 after Knable's guilty plea but before sentencing, when Knable *again* represented himself as either an attorney or CPA to an IRS audit supervisor.

Judge Pollack then summarized the information contained in the Government's Sentencing Memorandum, and asked if there was any dispute about that information. (App. 21). Knable's attorney replied that there was a dispute, and then explained Knable's version of the June 16th incident, saying that there had been an old power of attorney on file indicating that Knable was an attorney or CPA, but that he did *not* then represent that he was an attorney or CPA. (App. 21-22). No further reference was made to the incident.

Judge Pollack then proceeded to sentence Knable. The court described Knable's long record of misrepresenting himself and his qualifications, including, in addition to his guilty plea in this case, several incidents involving the unlawful practice of law, impersonating a police officer, and representing himself as a member of the Manhattan District Attorney's Office (App. 23-24). As the district judge noted in commenting on Knable's prior convictions, he was on each occasion merely fined, placed on probation, or conditionally discharged. Neither Knable nor his attorney disputed this prior record. When Judge Pollack referred to the fact that the indictment indicated many more charges beside the four to which Knable pleaded guilty, Knable's attorney explained that "they are all the same in substance." (App. 24). Before imposing sentence Judge Pollack commented:

"His exculpatory efforts at this time don't sit very well. This is the type of white collar crime which indicates an amoral sense and which leaves other members of the community to wonder what you can do and get away with." (App. 24).

The court then sentenced Knable to concurrent two year terms. When defense counsel asked the court to reconsider the sentence, the following exchange occurred:

"THE COURT: I have given this case a great deal of consideration. It is a very troublesome case. It is the kind of case where a modicum of misguided intelligence has led this man into the belief that he can do and say anything, provided he does not use weapons, and get away with it. I don't think society can tolerate that kind of conduct. I think he is being treated excessively leniently, considering the enormity of his transgressions.

MR. KOPPELMAN: Judge, if I may say, there has never been a claim that he has stolen money.

THE COURT: Do not stand there and moralize about what his conduct was. What do you expect? A man who goes about doing this kind of thing is worse than a man who confronts you physically, because you have no notice that this kind of conduct is going on. At least, when one confronts you physically with a weapon, you can see what is happening.

MR. KOPPELMAN: Your Honor——

THE COURT: The defendant is remanded.

MR. KOPPELMAN: May I just say, the report indicates the work he did was good, he didn't do people out of money, he charged reasonable rates.

THE COURT: His conduct is not what society expects or will tolerate. The defendant is remanded." (App. 25-26).

ARGUMENT

Judge Pollack Did Not Sentence Knable on the Basis of Material False Assumptions as to Facts Relevant to Sentence.

As this Court and the Supreme Court have recognized, a sentence is not ordinarily appealable where the sentence imposed is within the statutory maximum. *Dorszynski v. United States*, 418 U.S. 424, 440-41 (1974); *United States v. Seijo*, 537 F.2d 694, 700 (2d Cir. 1976), *cert. denied*, 429 U.S. 1043 (1977). Knable's concurrent two year sentences were well within the maximums established for violations of 26 U.S.C. § 7206(2) (three years) and 18 U.S.C. § 1001 (five years). Knable attempts to avoid this general rule against appellate review of sentences by making the claim that Judge Pollack acted on the basis of a materially false assumption. While some cases have held that a sentence may be vacated and remanded for resentencing where the sentencing judge acted on the basis of materially false information or assumptions, *see e.g. United States v. Robin*, 545 F.2d 775 (2d Cir. 1976); *United States v. Stein*, 544 F.2d 96 (2d Cir. 1976), this is not such a case.

Knable's argument to this Court is that Judge Pollack erroneously attributed "larcenous intent" to Knable. In his attempt to show this, Knable claims that:

"For example, the Court asserted first, without any basis for so doing, that defendant's tax clients had secured judgements against him for fraud. Later, the Judge similarly presumed, again baselessly, that Knable had fraudulently made purchases without any intention to pay for them." (Br. 8).

These arguments misconstrue the record. There was no mention at the sentencing of "larcenous intent." The only issue was as to Knable's fraudulent intent and that

issue was created by defense counsel and the defendant, both of whom attempted to convince Judge Pollack that Knable had no fraudulent intent when he misrepresented himself as an attorney and accountant.

In what may have been an attempt to probe this claim that there was no fraudulent intent, Judge Pollack made several inquiries. He tried to ascertain the source of Knable's bankruptcy indebtedness, asking Knable, "Isn't the source of that charges against you for fraud by your clients?" The defendant responded that he knew of no such suits by clients and that the \$180,000 in indebtedness came from unpaid credit card bills, and foreclosure of the mortgage on his home. Judge Pollack then asked, "you consider those not fraudulent, making purchases without intention to pay for them?" In response, the defendant claimed that he had intended to pay the bills at the time that he made the purchases. (App. 19).

In this Court, Knable attempts to portray Judge Pollack's mere questions as erroneous assumptions of fact. There is nothing in the record to indicate that Judge Pollack made any incorrect assumptions. The District Court only sought to elicit information about the nature of Knable's \$180,000 in debts. Thus, Knable essentially argues that the mere asking of questions by the District Court should be found by this Court to demonstrate the presence of erroneous assumptions. To accept this position would discourage District Courts from giving the defense the chance to speak to matters that have raised questions in the mind of the sentencing judge.

Indeed, it is this very effort by Judge Pollack to seek information that distinguishes this case from *United States v. Rotin*, *supra*, and *United States v. Stein*, *supra*, on which Knable relies. In those cases the primary error was the failure to afford the defense the opportunity to meet and to speak to the material misapprehensions under

which the sentencing judge was laboring. Here the record citations on which Knable relies are questions posed by Judge Pollack in an effort to give the defense the opportunity to speak to matters contained in the sentencing materials.

Contrary to Knable's suggestions, the record does not reflect that Judge Pollack rejected Knable's explanations about his \$180,000 debt. Knable answered the judge's questions and the judge received the explanations without attempting to contradict them. Most importantly, when the District Court made its formal statement as to its view of the case and its reasons for sentencing, the \$180,000 in debts was not even mentioned.

Knable appears to assume that Judge Pollack was required not only to accept his explanations about his bankruptcy debts, but also to accept his claim that his crime involved no fraud. In fact, there is no rule requiring a sentencing judge to close his eyes to reasonable inferences to be drawn from the defendant's conduct, even in the face of the defendant's attempts to give his conduct an innocent gloss. Notwithstanding Knable's protests to the contrary, there can be no question but that Knable's crime involved fraudulent conduct. As juries are frequently charged, a "scheme to defraud" is merely the taking of money or property through use of deceit. *Fasulo v. United States*, 272 U.S. 620 (1926). Knable's misrepresentation of himself as an attorney and accountant undoubtedly defrauded those clients who paid for his services believing him to be what he undisputedly was not.* Even if, as the defense asserts, Knable

* The defendant's own statements at sentence indicate that when his clients learned of the investigation of this case, they were no longer willing to pay his fees. (App. 18). This suggests that his clients previously parted with their money on the mistaken assumption that he was in fact the attorney and accountant that he pretended to be.

charged reasonable fees and did proper work, the element of fraud was present and Judge Pollack was not obliged to accept the defense's self-serving statements that there was no fraudulent intent.

In sum, there is no basis in this record for the claim that the sentencing judge acted on misunderstandings of material facts. Judge Pollack gave ample reasons for the fair and appropriate sentence which he imposed. There simply was no irregularity amounting to a denial of due process, as there were in other cases where sentences have been vacated. *See, e.g., Townsend v. Burke*, 334 U.S. 736 (1948); *United States v. Robin, supra*; *United States v. Stein, supra*; *United States v. Slutsky*, 514 F.2d 1222 (2d Cir. 1975); *United States v. Malcolm*, 432 F.2d 809 (2d Cir. 1970).

CONCLUSION

The judgment of conviction should be affirmed in all respects.

Respectfully submitted,

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AFFIDAVIT OF MAILING

STATE OF NEW YORK)
) ss.:
COUNTY OF NEW YORK)

David W. Denton being duly sworn deposes and says that he is employed in the office of the United States Attorney for the Southern District of New York.

That on the 7th day of October, 1977
he served a copy of the within brief by placing the same in a
properly postpaid franked envelope addressed:

Robert Koppelman, Esq.
115 Broadway
New York, N.Y. 10006

And deponent further says that he sealed the said envelope and placed the same in the mail box for mailing at the United States Courthouse Annex, 1 St. Andrew's Plaza, Borough of Manhattan, City of New York.

David W. Denton

Sworn to before me this

7th day of October, 1977

Phyllis G. Rush

PHYLLIS A. RUSH
 Public, State of New York
 No. 03-4635198
 Qualified in Bronx County
 Commission Expires March 30, 1978

